IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 14-1811

DAVID P. HILL,
Appellant,
v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,
Appellee.

APPELLANT'S SUPPLEMENTAL MEMORANDUM OF LAW

Patrick A. Berkshire
Amy F. Odom
Barton F. Stichman
NATIONAL VETERANS LEGAL SERVICES PROGRAM
1600 K Street NW
Suite 500
Washington, DC 20006
(202) 265-8305
patrick@nvlsp.org
amy@nvlsp.org
bart@nvlsp.org

Benjamin C. Block
Kevin King
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001
(202) 662-6000
bblock@cov.com
kking@cov.com

Counsel for Appellant

SUPPLEMENTAL MEMORANDUM

In response to the questions posed in the Court's March 29, 2016 order, and as explained more fully below, Appellant David Hill respectfully submits that:

1. The Board's favorable finding that Hill established veteran status (and that his active duty for training period constituted "active military service") is unreviewable under *Medrano v. Nicholson.*

2. Hill is entitled to the presumption of aggravation under *Biggins v. Derwinski* because he has established service connection for a knee disability sustained during his period of active duty for training, which therefore independently qualifies as "active military service."

3. An entrance examination is not required by statute, regulation, or precedent to establish the extent of Hill's preexisting psychiatric disorders, such that any competent evidence may be used as a baseline.[1]

[1] These issues pertain to Hill's claim for benefits based on psychiatric disorders, including post-traumatic stress disorder. The appeal also involves a separate and unrelated question regarding whether the Board erred in declining to reopen Hill's lower-back claim. *See* Brief for Appellant, at 1 (Vet. App. filed Dec. 17, 2014). The Court should vacate the Board's decision with respect to that claim and remand for further proceedings. *See id.* at 21–29; *see also* Memorandum Decision, at 7 (Vet. App. Oct. 30, 2015) (Greenberg, J.).

1. Did the Board establish that Mr. Hill was a veteran and, if so, is the Board's determination regarding Mr. Hill's veteran status a favorable finding of fact that the Court may not disturb, pursuant to *Medrano v. Nicholson*, 21 Vet. App. 165, 170 (2007)?

Yes, the Board found that Hill established veteran status as a result of his service-connected knee disability. That determination is a favorable finding of fact that this Court may not disturb.

The Board found that Hill established veteran status as a result of the knee disability he sustained during his June 1997 period of active duty for training. *See* Record (R.) 10 (2–24). The Board began by correctly reciting the test for establishing veteran status based on a period of active duty for training. *See* R. 9. The Board then found that Hill (i) "had a period of ACDUTRA from June 7, 1997 to June 21, 1997," and (ii) has "established" "[s]ervice connection … for a right knee disability based on th[at] June 1997 period." R. 10; *see also* R. 771–75 (771–80) (2003 rating decision granting service connection "for residuals of medial meniscus repair"). Based on these findings, the Board concluded that Hill "has achieved Veteran status with regard to the June 7–21, 1997 period of ACTDUTRA, *which is therefore considered active military service*." R. 18 (emphasis added); *see also* R. 10.

Medrano holds that this Court "is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority." 21 Vet. App. at 170. And this Court has already held that "the

Board's determination of 'veteran status' is a question of fact." *Bowers v. Shinseki*, 26 Vet. App. 201, 205 (2013) (citing *Struck v. Brown*, 9 Vet. App. 145, 152–52 (1996)); *see also Smith v. Shinseki*, 24 Vet. App. 40, 49 (2010) ("[A] determination of service connection is a finding of fact."). It follows that, when the Board finds that a claimant has established veteran status, that favorable finding of fact is unreviewable under *Medrano*.[2]

2. If a claimant establishes veteran status by showing that a disability was incurred in or aggravated during a period of ACDUTRA, does the claimant's veteran status then entitle him to the presumption of aggravation of a *different*, preexisting disability claimed to have been aggravated during the same period of ACDUTRA?

Yes. The plain text of 38 U.S.C. Sections 1101 (24)(B) and 1153 dictate that the presumption of aggravation applies in this case. An unbroken line of this Court's precedent, beginning with *Biggins v. Derwinski*, 1 Vet. App. 474 (1991), supports the same conclusion.

A. The statute dictates that the presumption applies.

The statutory presumption of aggravation provides: "A preexisting injury or disease will be considered to have been aggravated by *active military, naval, or air service*, where there is an increase in disability during such ser-

[2] This Court has repeatedly held in unpublished decisions that the Board's service-connection findings are unreviewable under *Medrano*. *See, e.g.*, *Weber v. McDonald*, No. 14-2707, 2015 WL 8787129, at *1 n.1 (Vet. App. Dec. 11, 2015). To the extent that *Bowers* and *Smith* do not resolve the issue, no clear precedent exists, and these decisions provide persuasive authority that veteran status is unreviewable under *Medrano*.

vice, unless there is a specific finding that the increase in disability is due to the natural progress of the disease." 38 U.S.C. § 1153 (emphasis added). The statutory definition of "active military, naval or air service" "includes … *any* period of active duty for training during which the individual concerned was disabled … from a disease or injury incurred or aggravated in line of duty." *Id.* § 101(24)(B) (emphasis added).

Taking these provisions together, the presumption of aggravation applies when a claim is based on a period of "active military, naval, or air service." Congress defined "active military, naval, or air service" to include active duty for training, so as a matter of plain meaning *some* active duty for training periods must qualify. Section 101(24)(B) provides the limiting principle. It states that a training period constitutes "active military, naval, or air service" so long as the claimant "was disabled … from a disease or injury incurred or aggravated in line of duty" during the training period.

Here, the Board made an unreviewable factual finding that Hill's June 1997 active duty for training period constitutes "active military service," because Hill was disabled from a knee injury incurred in line of duty during that period. R. 18; *see also* R. 698–99, 1751; R. 771–75 (771–80) (2003 rating decision granting Hill service connection "for residuals of medial meniscus

repair" with respect to his "serv[ice] on active duty for training").[3] Thus, Hill "was disabled … from a [knee] injury incurred … in line of duty" during the training period, which therefore constitutes "active military … service," 35 U.S.C. § 101(24)(B), to which the presumption of aggravation applies, *id.* § 1153. In other words, Hill's June 1997 active duty for training period meets the requirements for the presumption of aggravation *independently* of the disabilities at issue in his current claim.

There is no basis for interpreting the term "active military … service" differently with respect to veteran status under Section 101(24) than with respect to the presumption of aggravation under Section 1153. *See* Hill Renewed Mot. for Panel Dec'n, at 7–9 (Vet. App. filed Nov. 18, 2015). Indeed, this Court has previously held that the term "'aggravated' in Section 101(24)(B) carries the same definition as 'aggravated' in section 1153" based on "the well-established rule of statutory construction that terms in a statute have the same meaning [as] identical language used in related parts of the same statutory scheme." *Donnellan v. Shinseki*, 24 Vet. App. 167, 172 (2010). Applying the same interpretive canon, the phrase "active military … service" should likewise have the same meaning in Sections 101(24)(B) and 1153.

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[3] The Secretary has likewise recognized that Hill has established veteran status due to his knee disability and that his training period thus "constitutes active military service." Sec'y Br. 2–3, 10 (Vet. App. filed Apr. 2, 2015).

B. Precedent dictates that the presumption applies.

An unbroken line of decisions from this Court supports the conclusion that the presumption of aggravation applies when a claimant: (i) seeks benefits based on a period of active duty for training; and (ii) has already estab-established service connection for a separate disability sustained during that training period.

The first case in that line—and the one most directly on point—is *Biggins v. Derwinski*. Biggins suffered a back sprain during a period of active duty for training, but recovered a few weeks later. 1 Vet. App. at 475. One year after the training period ended, Biggins was diagnosed with multiple sclerosis. *Ibid.* Biggins sought benefits for multiple sclerosis and invoked the presumption of service connection in support of her claim. *Id.* at 477. That presumption, like the presumption of aggravation, applies only to "active military … service." *Ibid.* The Court thus observed that the "determinative question" was "whether th[e] appellant served in the 'active military … service.'" *Id.* at 478. The answer depended on whether Biggins was disabled in the line of duty "during her period of active duty for training." *Ibid.* Because she could not show "any *other* claimed or documented disability from injury or disease during her period of active duty for training," it "follow[ed] that her period of" active duty for training did not qualify as "active military … service" and that the presumption did not apply. *Ibid.* (emphasis added).

This Court's express reference to the absence of any "other" disability indicates that, if Biggins *had* made such a showing—as Hill has done with his knee injury—then the presumption would have applied.

The two concurring Judges so confirmed. Judge Kramer lamented a perceived "Catch-22": "Congress … directed that the presumption apply to … active duty for training," but "if both disease and disability must actually be present during active duty for training, use of the presumption may never be possible," since a claimant would need to "us[e] the presumption to obtain the presumption." *Id.* at 479. This Catch-22 could be resolved, however, in "a case where there is *another* 'claimed or documented disability from injury or disease during … active duty for training.'" *Id.* (emphasis added).

Judge Steinberg responded that there was no "Catch 22" because the presumption is available for "*any* [period of active duty for training] 'during which the individual concerned was disabled … from a disease or injury incurred … in line of duty.'" *Id.* at 479 (quoting 38 U.S.C. § 101(24)) (emphasis in original). Accordingly, if Biggins "had suffered a lasting back disability during service from her in-service back 'sprain' … then that back disability would be 'a disability' that would have qualified her [active duty for training] period as 'active … service' within the section 101(24) definition." *Ibid.* And, of critical relevance here, "[t]hat would have made her eligible for the benefit of the presumption" regarding her separate multiple-sclerosis claim. *Ibid.*

Accordingly, the "determinative question" in this case is the same as in *Biggins*—"whether during [his] period of active duty for training [Hill] was disabled from a disease or injury incurred or aggravated in line of duty." *Id.* at 478. The answer to that question is "yes." Hill (unlike Biggins) incurred *another* "documented disability from [a knee] injury … during [the same training] period." *Ibid.*; *see also id.* at 479 (Steinberg, J., concurring) (presumptions apply if claimant suffered "any other" disability during the same training period).

Paulson v. Brown, 7 Vet App. 466 (1995), applied the rule adopted in *Biggins*. Paulson sought benefits for psychiatric disorders aggravated during a period of active duty for training and invoked the presumptions of soundness and aggravation in support of his claim. *Id.* at 467–68. The Board found that Paulson was "not a veteran" entitled to invoke the statutory presumptions because he "had only active duty for training, and he [was] not otherwise a veteran (*for example, by reason of having a service-connected disability*)." *Id.* at 469 (emphasis added by this Court); *see also id.* (linking presumptions to whether training period qualifies as "active military, naval, or air service"). This Court agreed. Citing both of the concurring opinions in *Biggins*, the Court explained that "an individual who has served only on active duty for training must establish a service-connected disability in order to achieve veteran status." *Id.* at 470. Because Paulson did "not establis[h] any

service-connected disability" other than the psychiatric disorders at issue in his appeal, "the Board did not err in concluding that the presumption[s]" were "inapplicable." *Id.* at 470–71. It follows that when a claimant *does* establish a service-connected disability other than the one underlying his current benefits claim, as Hill has done, the period of "active … military service" has been established and the presumptions apply. *See id.* at 470–71.

This Court's subsequent cases are in accord with *Biggins* and *Paulson*. In *Donnellan*, the Court observed that "service on active duty for training, *without more*, will not suffice to give one veteran status." 24 Vet. App. at 172 (citing *Paulson*, 7 Vet. App. at 47) (emphasis added). Thus, to access to the statutory presumptions and obtain benefits based on a period of active duty for training, a claimant "must establish a service-connected disability." *Ibid.* Similarly, in *Bowers v. Shinseki*, the Court cited *Biggins* and *Paulson* for the proposition that the statutory presumptions are "inapplicable without previously established veteran status." 26 Vet. App. 201, 204–05 (2013). Consistent with all of these cases, Hill is entitled to the presumption of aggravation because, in contrast to Donnellan and Bowers, he has "previously established veteran status," by virtue of his service-connected knee disability.

Smith v. Shinseki, 24 Vet. App. 40, 48 (2010), which addressed a materially different factual scenario, is not to the contrary. Smith had a period of active service in 1982, thereby "qualifying her as a veteran for purposes of VA

benefits" for that period. *Id.* at 42. But Smith also had a subsequent period of active duty for training in 1999, during which she began to experience severe headaches. *Ibid.* Smith was diagnosed with a brain tumor and sought VA benefits based on the tumor, which she asserted "manifested … during her 1999 period of active duty for training." *Id.* at 43. The Board denied the claim, concluding that Smith had failed to establish veteran status with respect to the 1999 training period. *Ibid.* (citing *Biggins*, 1 Vet. App. at 477–78).

On appeal, this Court framed the key question as "whether Ms. Smith … is entitled to the presumptions of sound condition, service connection, and aggravation generally afforded to veterans." *Id.* at 44. Although Smith was a veteran with respect to her 1982 period of active service, that status did not control because Smith's claim "for service connection" was "based *only* on a [separate] period of active duty for training." *Ibid.* (alteration and emphasis added). The Court thus focused on whether Smith "became disabled as a result of a disease or injury incurred or aggravated in the line of duty *during* the period of active duty for training." *Ibid.* (citing *Paulson*, 7 Vet. App. at 470) (emphasis in original). The presumption of aggravation did not apply because Smith, unlike Hill, had *not* previously established service connection for an injury incurred during her 1999 training period. Hence, the training period did not independently qualify as "active military … service," and Smith could not invoke the presumption of aggravation. *See id.* at 42, 48.

Smith's seemingly categorical statement—"where a claim is based on a period of active duty for training, the presumption of aggravation under § 1153 is not applicable," *id.* at 48—only makes sense if the disability in question is the *only* one associated with a given training period. When a claim is based "only" on a training period that has not previously been classified as "active military … service," *id.* at 44, the claimant has no way—other than direct proof—to show that the claimed disability was sustained "in [the] line of duty." *Id.* at 48.[4]

Smith thus prevents "impermissible bootstrapping" by barring a claimant from using the presumption to establish a condition precedent—"active military … service"—for application of the presumption. *Biggins*, 1 Vet. App. at 479 (Kramer, J., concurring). But there is no such bootstrapping here because Hill's psychiatric-disorder claim is not based "only" on a period of active duty for training that may or may not be "active military … service" depending on the merits of that claim. Rather, it is based on a training period in which Hill indisputably incurred a *separate* service-connected disability—the knee injury—that qualifies the training period as "active military … service."

[4] *Smith*'s statement regarding active duty for training harmonizes with the rule set forth in *Biggins* and *Paulson*—two cases *Smith* cited and discussed with approval, *see* 24 Vet. App. at 44—when understood in this fashion.

In sum, the statutory text and this Court's precedent establish a straightforward rule: The presumption of aggravation applies to a benefits claim based on a period of active duty for training if, but only if, the claimant has *independently* established veteran status for that training period. Hill established that his June 1997 training period was "active … military service" by virtue of his knee disability. He therefore is entitled to the presumption for the separate psychiatric-disorder claim stemming from that same period.

3. If the answer to Question 2 is yes, does the claimant need to have a military entrance examination prior to his period of ACDUTRA or is other evidence acceptable to establish the baseline of his preexisting condition?

No, an entrance examination is not required for application of the presumption of aggravation. Other evidence—such as medical records—can establish the baseline of a claimant's preexisting condition.

Neither the statute that creates the presumption of aggravation, 38 U.S.C. § 1153, nor its implementing regulation, 38 C.F.R. § 3.306, mentions an entrance examination as a prerequisite.[5] Moreover, this Court has ad-

[5] In contrast, an entrance examination *is* a prerequisite for the presumption of *soundness*. That statutory presumption provides: "[E]very veteran shall be taken to have been in sound condition *when examined*, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted *at the time of the examination* … ." 38 U.S.C. § 1111 (emphases added). Applying that text in *Smith*, this Court held the presumption of *soundness* inapplicable because there was no evidence that "an examination was conducted" prior to the training period. 24 Vet. App. at 45–46. The Court did *not* rely on the lack of an examination in analyzing the presumption of *aggravation*. *Id*. at 48.

dressed the presumption of aggravation countless times, but has *never* held that an entrance examination is a precondition for its application. When the Court has declined to apply the presumption of aggravation, it has done so based not on the lack of an entrance examination, but on the claimant's failure to establish veteran status. *See, e.g.*, *Paulson*, 1 Vet. App. at 469–71.

Consistent with the absence of any statutory or regulatory prerequisite, the Board routinely applies the presumption of aggravation even when no entrance examination was conducted. *See*, *e.g.,* 2014 WL 3514859, at *4–7 (May 7, 2014) (applying presumption of aggravation even though "there was no service entrance examination"); 2013 WL 2901290, at *4–8 (Apr. 18, 2013) (same); 2012 WL 766768, at *5–6 (Jan. 13, 2012) (same).[6] These cases comport with the VA's longstanding position that "Sections 1111 [the presumption of soundness] and 1153 [the presumption of aggravation] establish independent factual presumptions," neither of which "incorporates the elements of proof and counter-proof in the other." VA Op. General Counsel 3-2003, 2003 WL 25767459, at *2 (July 16, 2003).

[6] This Court may take judicial notice of these decisions. *See Function Media, LLC v. Google, Inc.*, 708 F.3d 1310, 1316 n.4 (Fed. Cir. 2013) ("[I]t is proper to take judicial notice of a decision from another court *or agency* at any stage of the proceeding." (emphasis added)); *Haas v. Peake*, 525 F.3d 1168, 1189 (Fed. Cir. 2008) (looking to Board decisions to see how VA has interpreted its rules).

Because an entrance examination is not required by statute, regulation, or precedent for application of the presumption of aggravation, any competent evidence may be used to establish the baseline of a preexisting condition. This Court has concluded that medical records and written reports prepared by doctors are an acceptable means of documenting a preexisting condition. *See, e.g.*, *Martin v. Principi*, 17 Vet. App. 324, 329 (2003) (faulting Board for failing to consider doctor's opinion regarding "the veteran's preexisting conditions"); *Corry v. Derwinski*, 3 Vet. App. 231, 237 (1992) ("medical records" may serve as "evidence … that a psychiatric condition existed prior to service"). In some instances, lay testimony may also be sufficient. *See, e.g.*, *Kahana v. Shinseki*, 24 Vet. App. 428, 433–34 & n.4 (2011).

Ample medical evidence documents Hill's baseline psychiatric condition prior to the June 1997 training period. Doctors' notes show that Hill suffered from psychiatric disorders, including "problems with depression," prior to the training period. R. 1067 (1067–69); *see also* R. 683. However, medical reports also show that Hill received treatment for these disorders and that his symptoms had "improv[ed] significantly" in response to the treatment prior to the 1997 training period, during which Hill was the victim of a traumatic lightning strike. R. 683; *see also* R. 1067 (1067–69).

CONCLUSION

Hill was awarded service-connection for a knee injury incurred during a period of active duty for training. That period therefore constitutes "active military … service" under 38 U.S.C. § 101(24)(B). Hill now seeks benefits for psychiatric disorders that increased in severity during the same training period. Because Hill has independently established veteran status with respect to the training period, the presumption of aggravation, *id.* § 1153, applies. Accordingly, this Court should hold that the presumption applies to Hill's psychiatric-disorder claim and remand for further proceedings.

Respectfully submitted,

/s/ Kevin King

Patrick A. Berkshire
Amy F. Odom
Barton F. Stichman
NATIONAL VETERANS LEGAL SERVICES PROGRAM
1600 K Street NW, Ste. 500
Washington, DC 20006
(202) 265-8305
patrick@nvlsp.org
amy@nvlsp.org
bart@nvlsp.org

Benjamin C. Block
Kevin King
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001-4956
(202) 662-6000
bblock@cov.com
kking@cov.com

Counsel for Appellant

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